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No. 10-789

IN THE

Supreme Court of the United States

PATRICK SHAWN BARRETT, et al.,

Petitioners,

v.

COUNTY OF VENTURA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the failure of petitioners (as well as respondent and any judge at the three levels of the state court system) to mention the existence of any federal or federal constitutional provisions preclude them from raising such an issue for the first time in a federal appeal?

2. Does res judicata, collateral estoppel, or any doctrine of former adjudication bar relitigation of petitioners' claims, which were thoroughly presented to and rejected by a state superior court jury during eight days of trial in January of 2009; confirmed by the trial court judge; unanimously affirmed in full by the state court of appeal, which also denied petitioners' reconsideration petition; and which the California Supreme Court declined to disturb?

3. If this Court were to reach the takings claims raised for the first time in the pending certiorari petition, would federal law construing the Takings Clause of the Fifth Amendment differ from California law of inverse condemnation, which requires some conscious or deliberate government decision causally connected to the land failure, in order to approximate eminent domain?

4. Can a local government be strictly liable for the unaltered topographical terrain, in this case involving a slightly downsloping street in a residential housing tract?

5. Is petitioners' attack upon the California Supreme Court decision implementing a rule of reasonableness for the evaluation of surface water drainage claims against municipalities, which allows consideration of misconduct of the plaintiff landowners, inconsistent with the United States Constitution?

IDENTITY OF THE RESPONDENT

The respondent, the County of Ventura, is a municipality which is one of 58 counties in the State of California. There are no associated defendants/ respondents.

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I

PROCEDURAL HISTORY

The petitioners filed their original complaint in the Superior Court of the State of California for the County of Ventura. It contained causes of action for inverse condemnation, trespass, nuisance, dangerous condition of public property, and negligence. A subterranean 18-inch-diameter corrugated metal pipe installed by the original housing tract developer in 1963 traveled the length of the boundary between the two parcels eventually acquired by the petitioners. The pipe began at the curb face of the front of the two homes and emptied out from the face of the steep hillside chasm forming the subject properties' backyards. The County of Ventura, the only defendant, was alleged to have negligently maintained the initial portion of the drainage improvement in the street and for some distance beyond throughout the period of approximately 1963 through the present. The complaint further alleged that the respondent County did not perform any maintenance of the pipe whatsoever.

On January 16, 2007, the superior court granted judgment on the pleadings as to the inverse count in favor of the County of Ventura, with leave to amend. The first amended complaint was filed on February 5, 2007. The respondent was alleged to have refused to do anything whatsoever in repair of the allegedly offending drainpipe, informing the petitioners that because the County had refused formal dedication of the subject drainage easement approximately 40

years earlier, it never had any responsibility to repair the pipe or its damage.

The superior court sustained the County's demurrer to the first amended complaint as to the first cause of action for inverse condemnation. Twenty days' leave to amend was granted.

The second amended complaint was filed on April 16, 2007. It continued the theme that the January 23, 2005, explosion which eroded the backyard hillside of the petitioners' homes was caused by the broken-off and corroded drainpipe dangling over the cliff. The pipe corroded over time and ruptured, which allowed water to seep into the subsurface soil of the petitioners' lands. The metal drainpipe had a life expectancy of 30 years and failed in its 42nd year of use. The resultant seepage of water, continuing over a long period of time, caused the strength of the soil mass underlying the petitioners' premises to fail, resulting in massive landslides.

Respondent County demurred to the inverse count of the second amended complaint on April 26, 2007. The petitioners opposed the demurrer. The court sustained the demurrer to the first cause of action for inverse condemnation without leave to amend on June 15, 2007.

Respondent answered the balance of the second amended complaint on June 21, 2007. Petitioners made a series of motions requesting the court to reverse itself as to the sustaining of the demurrer.

Motions for reconsideration, for leave to amend the complaint, and for leave to file a third amended complaint were made, respectively, on June 28, September 21, and October 4, 2007. Respondent opposed these efforts. The superior court denied the motions.

The case went to trial on the two remaining causes of action for dangerous condition and nuisance in October of 2008. Both sides submitted multiple trial briefs, in limine motions, and jury instructions. Extensive days of pretrial proceedings allowed counsel for both sides to argue these various filings, on October 22, 23, 28, 30, 31, and November 7 and 12, 2008, continuing on January 1, 2, and 6, 2009.

Jury selection began on January 8, 2009. Presentation of opening statements, evidence, closing arguments, and jury instructions continued on January 9, 13, 14, 15, 20, 21, 22, and 23. The jury deliberated during the day of January 27, 2009, and returned its verdict.

The jury determined that the County property, a slightly downsloping street which the County had accepted from the developer at the same time as the County rejected the developer's offer of dedication of the easement in which the offending drainpipe was situated, and a drain between the street and petitioners' private drainpipe, was not in a dangerous condition at the time of the landslide which was the subject matter of the lawsuit. The jury further determined that the County's property

did not create a condition which amounted to a nuisance. Final judgment was entered in respondent' s sole favor, by the Ventura Superior Court, on March 27, 2009.

The petitioners timely appealed to the state court of appeal on June 4, 2009. They filed their opening brief in the court of appeal on December 18, 2009. Respondent filed its brief in the state court of appeal on February 10, 2010. Petitioners filed a reply brief in the court of appeal on March 2, 2010.

Oral argument before the court of appeal occurred on April 14, 2010. The unpublished opinion of the court of appeal was filed on June 23, 2010. It unanimously affirmed the judgment in full in favor of the respondent.

Petitioners filed a rehearing petition in the court of appeal on July 9, 2010. Respondent answered the rehearing petition, pursuant to an order of the court of appeal, on July 19, 2010. Petitioners filed a reply to the answer on July 20, 2010. The petition for rehearing was denied by the court of appeal on July 22, 2010.

Petitioners filed a timely petition for review to the California Supreme Court on August 10, 2010. The Supreme Court considered and denied the petition on September 15, 2010. The remittitur issued, completing the case, on October 5, 2010. This document restored original jurisdiction to the

Ventura Superior Court to enforce the award of costs to respondent contained in the final judgment.

STATEMENT CONTESTING JURISDICTION

Respondent contests the jurisdiction of the federal system. No mention of the Takings Clause, the United States Constitution, or any federal issue was ever raised, briefed, or addressed by the petitioners, by the respondent, or by any judge of the superior court, court of appeal, or state Supreme Court. Having failed to raise this issue below in the state court system, petitioners cannot now raise it for the first time in a certiorari petition.

FACTS RELEVANT TO THE PETITION

Petitioners, plaintiffs in the state court system, decided to purchase two homes perched near the edge of a hillside chasm. The housing tract is located in a mountainside development which has exclusive homes commanding a majestic view of the Pacific Ocean. These view properties are situated in a hilly area, and the natural terrain selected by the developer which built these homes in the early 1960' s has several slightly downsloping streets.

The County of Ventura did not construct anything in the hillside tract. The County did not build the roads or have anything to do with recommending the construction of the housing tract itself.

The Ventura County Board of Supervisors expressly rejected the tract developer' s offer of dedication of the drainage easement in September of 1963. The County of Ventura never wavered from the rejection and never had anything to do with that drainpipe or its easement. The County did not select the drainpipe, nor did it give any advice about the pipe or material for its construction to anyone, the developer or any subsequent landowner. The County of Ventura did not install, service, or maintain the drainpipe or any part of it. The County never made any promises or representations whatsoever about the pipe, the easement, or the stability or safety of the land or homes.

The County of Ventura never built, owned, modified, acquired, operated, or controlled any waterworks or water-bearing facilities adjacent to or upstream from the petitioners' homes. The County did nothing to alter the standard, paved street providing ingress and egress for the petitioners' homes and the homes of other neighbors on that street. The petitioners did not produce any expert witness at trial indicating that there was anything substandard or wrong with the street (the petitioners did some cross-examination of the Public Works Director of the County of Ventura along these lines, but he denied that there was anything substandard about the street or which could have been done differently to avoid channeling water down the street to the petitioners' homes).

Despite petitioners' self-serving characterization of " public water," there is no government source of water whatsoever in, on, or adjacent to the subject street leading to petitioners' homes. By the rhetorical ruse of saying " public water," petitioners are really referring to adventitious water from rain and private irrigation sprinklers.

The County of Ventura did not select the drainpipe or give any advice about the pipe or material for its construction. The County did not install, service, or maintain the drainpipe or any part of it. The County never made any promises or representations about the pipe whatsoever.

To state the proposition in the reverse, the only involvement of respondent was rejecting the original tract developer' s offer of dedication of this and other easements on private property, while accepting the housing tract developer' s offer of dedication of the streets. Thereafter, the County' s only involvement was to resurface the streets when they deteriorated, periodically. Otherwise, the County is not guilty of having any involvement whatsoever with the problem which the petitioners chose to purchase.

Under California law, all theories of liability involving adventitious surface water flow are analyzed under a state Supreme Court decision entitled *Locklin v. City of Lafayette*, 7 Cal.4th 327 (1994). It is true, parenthetically, that a judge of the Ventura Superior Court had dismissed the inverse condemnation cause of action, per se, at an earlier

juncture before trial. The basis of that ruling was that, under various California appellate authorities, there was nothing in the nature of a conscious, deliberate decision or strategy which causally connected to the land failure, and without some conscious governmental decision, there is no analogy to eminent domain, from which the courts have derived inverse condemnation. Therefore, the petitioners did not have the inverse condemnation cause of action during trial, but all that meant was that they could not recover the vast panoply of remedies in California law for a successful inverse condemnation case, such as attorneys' fees, expert fees, and prejudgment interest. The *Locklin* rule gives a water tort plaintiff in California the identical evaluative matrix when suing a municipality for adventitious flow of water over improved hardscape. Therefore, the petitioners did have their inverse theory, in law and in fact, during the trial, even though they would not have been able to recover attorneys' fees, prejudgment interest, and expert witness fees if they had obtained the jury' s verdict.

DOES THE FAILURE OF PETITIONERS (AS WELL AS RESPONDENT AND ANY JUDGE AT THE THREE LEVELS OF THE STATE COURT SYSTEM) TO MENTION THE EXISTENCE OF ANY FEDERAL OR FEDERAL CONSTITUTIONAL PROVISIONS PRECLUDE THEM FROM RAISING SUCH AN ISSUE FOR THE FIRST TIME IN A FEDERAL APPEAL?

The petitioners never included any mention whatsoever of an issue relating to federal law, the Takings Clause, the Fifth Amendment, or the United States Constitution in any of the state court proceedings. There was no mention of such issues in any of the three versions of the complaint; in any brief filed in the state superior court; in the opening, reply, or reconsideration briefs filed in the state court of appeal; or in the petition for review to the California Supreme Court. Nor were any of these issues mentioned by respondent or by any judge of any court at any of the three levels of the state court system.

There was nothing to have prevented the petitioners from having included a cause of action for a Fifth Amendment taking in any of the versions of their complaint in the state superior court. This Court has held that a state court's refusal to entertain federal claims against municipalities, when the state court system entertains similar state-law actions, violates the Supremacy Clause. *Howlett v. Rose*, 496 U.S. 356 (1990). The state court never prohibited petitioners from asserting a Fifth

Amendment taking or any federal constitutional claim; indeed, petitioners never presented any such claim in the state court system.

Each of the following federal appellate precedents holds that issues raised for the first time on appeal cannot be considered because they have been waived: *Connecticut General v. New Images*, 321 F.3d 878, 882 (9th Cir. 2003); *Yeti by Molly, Ltd. v. Deckers*, 259 F.3d 1101, 1108 (9th Cir. 2001); *Doi v. Halekulani*, 276 F.3d 1131, 1140 (9th Cir. 2002); *In re America West*, 217 F.3d 1161, 1165 (9th Cir. 2000); *Martinez v. Texas Dept. of Criminal Justice*, 300 F.3d 567, 574 (5th Cir. 2002).

DOES RES JUDICATA, COLLATERAL ESTOPPEL, OR ANY DOCTRINE OF FORMER ADJUDICATION BAR RELITIGATION OF PETITIONERS' CLAIMS, WHICH WERE THOROUGHLY PRESENTED TO AND REJECTED BY A STATE SUPERIOR COURT JURY DURING EIGHT DAYS OF TRIAL IN JANUARY OF 2009; CONFIRMED BY THE TRIAL COURT JUDGE; UNANIMOUSLY AFFIRMED IN FULL BY THE STATE COURT OF APPEAL, WHICH ALSO DENIED PETITIONERS' RECONSIDERATION PETITION; AND WHICH THE CALIFORNIA SUPREME COURT DECLINED TO DISTURB?

Res judicata constitutes an affirmative defense. The application of this doctrine to bar relitigation of a matter already decided derives from the full faith

and credit statute, 28 U.S.C. §1738. That statute requires federal courts to accord a state court judgment the same preclusive effect which it would have in state court. *Long v. Shorebank Development*, 182 F.3d 548, 560 (7th Cir. 1999).

When the state court judgment would not preclude further litigation in the state court of an issue which turns out to be important to a federal claim, the federal court may proceed. Otherwise not. *Marrese v. American Academy*, 470 U.S. 373, 381 (1985); *accord*, *Long v. Shorebank*, 182 F.3d at 560.

If a final judgment has been entered in a plaintiff' s state court lawsuit, dismissing the suit in its entirety, it is appropriate to determine the preclusive effect of the state court judgment. *Spoklie v. State of Montana*, 411 F.3d 1051, 1055-56 (9th Cir. 2005), overruled by implication on another point in *Lingle v. Chevron*, 544 U.S. 528 (2005). In ascertaining the preclusive effect of a state court final judgment, the federal court applies the law of the state which issued the judgment. *Id.*

The final judgment of a trial court is entitled to preclusive effect. *Spoklie*, 411 F.3d at 1056. Under Montana preclusion law, for example, a claim litigated in a former action and claims which might have been litigated in that action are barred. *Id.*

A resolved claim will be res judicata (under Montana law) as to subsequent claims if four circumstances concur. The parties must be the same. The

subject matter must be the same. The issues must be the same —that is, relating to the same subject matter. Finally, the capacities of the persons must be the same in reference to the subject matter and issues to be resolved. *Spoklie*, 411 F.3d at 1056. The *Spoklie* court stated, " All four requirements are easily met here." *Id*.

The issue again arose in the case of *Brodheim v. Cry*, 584 F.3d 1262 (9th Cir. 2009). The *Brodheim* court held:

> Under 28 U.S.C. §1738, federal courts are required to give state court judgments the preclusive effects they would be given by another court of that state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 . . . (1984); *Maldonado v. Harris*, 370 F.3d 945, 951 (9th Cir. 2004).

Brodheim, 584 F.3d at 1268.

The *Brodheim* court reversed a finding by the district court because it applied the standard used to analyze the preclusive effect of prior federal court judgments, not prior state court judgments. California law holds that a final judgment of a state court precludes further proceedings when they are based upon the same cause of action. 584 F.3d at 1268. Unlike the federal courts, which apply a transactional nucleus of facts test, California courts employ the primary rights theory to determine what

constitutes the same cause of action for claim-preclusion purposes. *Id.*

Under California law, a cause of action is a primary right possessed by a plaintiff, a corresponding primary duty devolving upon the defendant, and a harm done by the defendant which consists of a breach of such primary right and duty. *City of Martinez v. Texaco Trading*, 353 F.3d 758, 762 (9th Cir. 2003), citing *Citizens for Open Access, etc. v. Seadrift*, 60 Cal.App.4th 1053, 1065 (1998), *accord*, *Brodheim*, 584 F.3d at 1268. If two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake, even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief, and/or adds new facts supporting recovery. *Eichman v. Fotomat*, 147 Cal.App.3d 1170, 1174 (1983); *accord*, *San Diego Police Officers Association v. San Diego City Employees' Retirement System*, 568 F.3d 725, 734 (9th Cir. 2009); *accord*, *Brodheim*, 584 F.3d at 1268.

This Court, in the *Marrese* decision, 470 U.S. at 380, explained that 28 U.S.C. §1738 directs a federal court to refer to the preclusion law of the state in which the judgment was rendered. It has long been established that §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands federal courts to accept the rules chosen by the state from which the judgment is taken. *Id.*

The *Marrese* decision explains that §1738 embodies concerns of comity and federalism which allow the states to determine the preclusive effect of judgments in their own courts. Such determination is limited by the fundamental fairness provision of substantive due process.

In *Matsushita Electric v. Epstein*, 516 U.S. 367, 375 (1996), this Court held that when faced with a state court judgment relating to an exclusively federal claim, a federal court would first look to the law of the rendering state to ascertain the effect of the judgment. If state law indicates that the particular claim or issue would be barred from litigation in a court of the same state, then the federal court would next decide whether, as an exception to §1738, it should refuse to give preclusive effect to the state court judgment. But in the absence of federal law modifying the operation of §1738, the preclusive effect in federal court of a state court judgment is determined by state law. *Matsushita*, 516 U.S. at 375.

The petitioners litigated the living daylights out of every conceivable issue in the subject litigation. In the state court action, multiple versions of the complaint were filed. There was a full and comprehensive jury trial, with multiple days of pretrial and trial proceedings, a verdict, and then a full-blown direct appeal to the state court of appeal. Petitioners filed three comprehensive briefs in the court of appeal, and there was full legal argument, along with an unpublished opinion.

The wrong said to have been done by respondent was the same as raised in the certiorari petition. This was the claimed responsibility of a local government for an accepted dedication of slightly downsloping streets which channel adventitious water runoff into a wholly privately owned subterranean pipe which straddles the boundary line of two parcels of private property. The issues of whose responsibility it was to know of and maintain the private pipe were litigated extensively.

The damage claimed —the hillside blowout in the petitioners' backyard chasm —was the same. That hillside blowout in January of 2005 caused by the corroded pipe, causing substantial recession of the backyard hillsides of the two parcels of realty, was the damage claimed in the state court suit and now in this federal certiorari petition.

The two actions — the concluded state court litigation and this certiorari petition — therefore involve the same injury to the same petitioners and the same wrong said to have been committed by the same defendant. The same primary right is at stake, even though this subsequent suit has the petitioners pleading different theories of relief (under the federal Constitution). The subsequent action, this certiorari petition, is blocked by principles of former adjudication, especially res judicata. *Brodheim*, 584 F.3d at 1268; *Eichman*, 147 Cal.App.3d at 1174; *San Diego Police Officers Association*, 568 F.3d at 734.

Plaintiffs dissatisfied with the legal and factual rulings in their own state cannot pick up a certiorari petition and use it as a cudgel to relitigate the matter from scratch. *Kremer v. Chemical Construction*, 456 U.S. 461, 466-467 (1982). The *Kremer* court stated that §1738 requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment. The Court' s analysis in *Kremer* began with the finding that state law would, in fact, bar relitigation of the discrimination issue decided in earlier state proceedings. 456 U.S. at 466-467. That finding implied that the plaintiff could not relitigate the same issue in federal court, unless some exception to §1738 applied.

Kremer observed that an exception to §1738 will not be recognized unless a later statute contains an express or implied repeal. In that case, the Supreme Court held that Title VII does not expressly repeal §1738, so the Court concluded that the statutory provisions and legislative history did not support a finding of implicit repeal. *Kremer* concluded that its holding applied to a lawsuit involving a claim within the exclusive jurisdiction of the federal courts. 470 U.S. at 381.

IF THIS COURT WERE TO REACH THE TAKINGS CLAIMS RAISED FOR THE FIRST TIME IN THE PENDING CERTIORARI PETITION, WOULD FEDERAL LAW CONSTRUING THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT DIFFER FROM CALIFORNIA LAW OF INVERSE CONDEMNATION, WHICH REQUIRES SOME CONSCIOUS OR DELIBERATE GOVERNMENT DECISION CAUSALLY CONNECTED TO THE LAND FAILURE, IN ORDER TO APPROXIMATE EMINENT DOMAIN?

California law requires something akin to a conscious thought process indicating a reasoned intent to acquire private property or, analogously, recognizing the potential for the governmental decision to acquire private property. A conscious decision-making process causally connected to the governmental destruction of private property substitutes for the deliberate seizure of private property involved in eminent domain, so that inverse condemnation is the " inverse" of eminent domain because there is a deliberate governmental decision to do or refrain from doing something which is proximately connected to the destruction of private property.

This requirement of a deliberate governmental act to undertake a particular plan or manner of maintenance is the *sine qua non* of an inverse condemnation cause of action. The leading modern authority on this topic is the California Court of

Appeal' s decision in *Tilton v. Reclamation District No. 800*, 142 Cal.App.4th 848, 853-859 (2006). In *Tilton*, heavily relied upon in respondent' s demurrer sustained without leave to the inverse condemnation cause of action, the unanimous appellate court held that the government' s demurrer was properly sustained to the plaintiffs' two taking causes of action. The *Tilton* court agreed with the trial court that these causes of action failed to state a claim either in inverse condemnation or for a taking of private property for a public use. 142 Cal.App.4th at 854.

The *Tilton* plaintiffs attempted to set forth causes of action for inverse condemnation and alleged violation of the federal civil rights statute, 42 U.S.C. §1983. The trial court had sustained the defendant government' s demurrers, without leave to amend, to both of those causes of action.

The *Tilton* court agreed with the trial court that these causes of action failed to state a claim either in inverse condemnation or for the taking of private property for a public use. 142 Cal.App.4th at 854. The *Tilton* decision stated that the California Supreme Court had twice taken pains to carefully limit the principle of inverse condemnation by stating, " Damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the scope of the rule applied in the present case." *Id.* at 855. A collection of debris and stumps in a storm drainage ditch constructed by the defendant county in one of

those two cases allegedly raised an obstruction which caused water to back up onto the plaintiffs' land; the state Supreme Court held that if this blockage was due to mere negligent operation of the ditch system, it was not within the scope of liability as a taking or damaging for public use. *Id.*

At 142 Cal.App.4th 855-856, the *Tilton* court turned to a discussion of an appellate decision which the court characterized as being perhaps the closest case to the issue at hand. In that case, the plaintiffs' greenhouse and plant-growing suffered substantial damage when the levee maintained by the defendant flood control district along a creek suffered a 60-foot break. The plaintiffs notified the defendant district of the break and of the threat of damage, but no repairs were made, with the result that water and debris carried by the water damaged the plaintiffs' property on two occasions thereafter.

In that earlier case, the plaintiffs sued for inverse condemnation and negligence. The appellate court held that the defendant district had no liability to plaintiffs under a theory of inverse condemnation. Problems which arise when a public agency " is carrying out a deliberate plan with regard to the construction of public works" are inversely compensable, whereas without that indispensable element of the cause of action, damage is not inversely compensable. An example of the type of activity for which a government is not inversely liable is acts of carelessness or neglect on the part of a public agency.

The *Tilton* court next discussed another case in which the plaintiff' s land was damaged by flooding from overflows of a creek. Those overflows resulted from heavy rains which caused a reservoir to fill up quickly and transmit a large volume of water down a spillway into the creek and then onto the plaintiff' s property. Rejecting the application of a taking, the earlier appellate court held that this damage from the routine operation of a water-bearing facility, having no relation to the function of the project as conceived, was not a taking for public use " and thus not a basis for inverse condemnation." 142 Cal.App.4th at 856.

The *Tilton* opinion next turned to a discussion of the *Arreola* decision. 142 Cal.App.4th at 857. The key distinction separating out inverse liability, according to the *Tilton* decision at 857, is whether the defendant government designed, constructed, and was thereafter charged with implementing a deliberate plan. According to the *Tilton* court' s interpretation of the *Arreola* decision, a public entity' s maintenance of a public improvement would constitute constitutionally required government use only if it was the entity' s deliberate act to undertake the particular plan or specified manner of maintenance. *Tilton* stated, " The necessary finding is that the wrongful act be part of the deliberate design, construction, or maintenance of the public improvement." *Id.*

The fundamental justification for inverse liability is that the government, acting in furtherance of

governmental objectives, takes "a calculated risk that private property may be damaged. . . . That is why simple negligence cannot support the constitutional claim." 142 Cal.App.4th at 857.

The *Tilton* decision stated that the *Arreola* court keyed inverse liability to the adoption of "a deliberate plan with regard to the construction of public works." *Id.* at 858. The public entity must have "made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk." *Id.*, interpreting *Arreola*. *Tilton* further tracked the *Arreola* opinion by stating that in order to prove the type of governmental conduct which will support liability in inverse condemnation, the plaintiff must show that the public entity "was aware of the risk posed by its public improvement and deliberately chose a course of action —or inaction —in the face of that known risk." *Id.*, citing *Arreola*.

Tilton next turned to an appellate decision published in 2003. In that case, the appellate court concluded that the plaintiff's land damage was directly caused by a government plan which benefitted all of California by saving billions of tax dollars. But it also resulted in the failure of a certain levee, which caused plaintiff's land to be inundated. In that earlier case, a basic part of the government's plan was to control periodic flooding by accepting existing levees as much as possible in order to reduce the cost of an extensive, coordinated flood control system. The state government never tested that particular levee or reviewed any records of its

construction in order to determine if it really was as strong as the global plans which it deliberately adopted assumed. The state government itself even ignored specific warnings about the levee's weakness. 142 Cal.App.4th at 858.

The *Tilton* court distilled the legal principle that in order to be liable for inverse condemnation or taking, there must be "a flawed plan . . . and/or flawed construction." *Id.* The converse of that requisite element of inverse condemnation is that "there is no such liability where similar failures are the result of negligent or inadequate operation and maintenance." *Id.* The crucial aspect of inverse liability in unwanted-water cases is the distinction that the problem must have been "integrally connected to an overall plan." *Id.* Earlier appellate decisions suggesting that inverse condemnation takings were pure strict liability are "now of questionable value" since the Supreme Court has twice suggested that those decisions relied upon an incorrect automatic liability test. *Id.*

The decision relied upon in the certiorari petition, at pages 8 and 9, *United States v. Dickinson*, 331 U.S. 745 (1947), clearly involved a significant set of deliberate decisions implemented by the federal government. In *Dickinson*, the federal government deliberately altered the course of a river. The government chose to modify the course of the river as part of its strategic plan to raise a river's level.

Dickinson unmistakably concerned deliberate conscious choices by the government designed to improve the navigability of a river in West Virginia. The concept was to build a dam. This strategy was certainly a conceived plan.

The water above the dam was to be impounded in order to deepen the channel to raise the river level in that area. The government project succeeded by raising the river, in successive stages, a total of 11 feet. The new height of the river flooded the plaintiff' s land.

While the government in *Dickinson* did not directly condemn the land in traditional eminent domain proceedings, it made a conscious choice, embodied in a series of deliberate decisions, which ruined the plaintiff' s property. But in the present case, the subject of the certiorari petition, no version of the complaint nor a shred of evidence produced or offered during eight days of trial evinced any conscious decision, deliberate action, or strategic plan undertaken by the respondent government, the County of Ventura. The present case was never anything except a county' s long-ago acceptance of a privately built road serving as ingress and egress for a residential housing tract.

CAN A LOCAL GOVERNMENT BE STRICTLY LIABLE FOR THE UNALTERED TOPOGRAPHICAL TERRAIN, IN THIS CASE INVOLVING A SLIGHTLY DOWNSLOPING STREET IN A RESIDENTIAL HOUSING TRACT?

As the California Court of Appeal rightly recognized in *Mittenhuber v. City of Redondo Beach*, 142 Cal.App.3d 1 (1983), governments cannot be liable for the topography and natural terrain of property. The *Mittenhuber* court explained:

> The mere fact that a road slopes downhill does not mean that it is dangerous. To hold the defendant liable for the natural topography of the land would be to impose strict liability on the defendant as an insurer of the safety of its streets. The City would be required to either grade all of its streets level in hilly areas or to forego development in such areas. An ordinary, natural topographical condition is not a dangerous condition of property within the meaning of the governmental tort liability law. It is such, and requires a warning sign, only when it constitutes a deceptive condition or trap for even those who use the property with due care. [Citations omitted.] Highways are normally adapted to the natural geographic feature of the lay of the land.

142 Cal.App.3d at 7.

The rule of strict liability urged by the certiorari petition would make every government in California which accepted an offer of dedication of slightly downsloping streets strictly liable. This would be massively counterproductive, because governments would simply reject all such offers of dedication, fearing the large-scale and uninsurable risks which attended acceptance of such offers. The result would be private responsibility to maintain roadways. Private landowners would not have the technology or funds available to seal, resurface, and clear streets. There would be no ingress into or egress from housing tracts, as roads deteriorated with the passage of time after the developer initially constructed them. The rule of reasonableness selected in California makes tremendous sense because it judges governments fairly, factoring into the evaluative matrix whether the problem was caused by the plaintiff homeowners themselves, as it was in this case (please refer to next heading).

IS PETITIONERS' ATTACK UPON THE CALIFORNIA SUPREME COURT DECISION IMPLEMENTING A RULE OF REASONABLENESS FOR THE EVALUATION OF SURFACE WATER DRAINAGE CLAIMS AGAINST MUNICIPALITIES, WHICH ALLOWS CONSIDERATION OF MISCONDUCT OF THE PLAINTIFF LANDOWNERS, INCONSISTENT WITH THE UNITED STATES CONSTITUTION?

The present litigation went to trial on two theories, dangerous condition of public property and

nuisance. The most relevant appellate authority governing disposition of water torts, both inverse and non-inverse, where the fact pattern involves hardscape increasing the volume, flow, and direction of adventitious water, is the California Supreme Court' s decision in *Locklin v. City of Lafayette*, *supra*, 7 Cal.4th 327. A separate body of California law, which is in the nature of strict liability, governs rupture or malfunction of government water-bearing facilities, such as pipes, sewers, reservoirs, and dams. But for cases such as the present one, where the fault is said to rest with hardscape improvements, the most relevant appellate decision is *Locklin*.

The Supreme Court observed in *Locklin*:

> This is not to say that public entities incur absolute liability for any damage caused by the runoff of surface water from improvements on its property into a natural watercourse or from public improvements constructed in or on a watercourse. . . . [T]he public agency is liable only if its conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff' s property. The rule of strict liability generally followed in inverse condemnation [citation] is not applicable in this context.
>
> Because a public agency, like any riparian property owner, engages in a

> privileged activity when it drains surface water into a natural watercourse or makes alterations to the watercourse, article I, section 19 of the California Constitution mandates compensation only if the agency exceeds the privilege by acting unreasonably with regard to other riparian owners.

7 Cal.4th at 367.

The *Locklin* holding extends to non-inverse torts as well:

> Therefore, while the Court of Appeal did not refer to the nuisance and trespass causes of action, it did not err in affirming the judgment for County and District. Giving plaintiffs' evidence all the weight to which it is entitled, and drawing all legitimate inferences favorable to plaintiffs from that evidence, it is not sufficiently substantial to support a verdict for plaintiffs on those causes of action. [Citation.] . . . ¶ Finally, we note with regard to both tort and inverse condemnation liability that the evidence reflects no efforts by plaintiffs themselves to protect their properties . . . .

7 Cal.4th at 373-374.

The *Locklin* court affirmed judgment as a matter of law in favor of the municipal defendants. The plaintiffs did not establish that the defendants acted

unreasonably in the construction of improvements or alteration of the method of discharge of the runoff. Nor did plaintiffs establish that they themselves acted reasonably to protect their properties from water-caused damage. 7 Cal.4th at 361. The California Supreme Court stated, " [B]ecause strict liability would discourage construction of needed public improvements which affect surface water drainage, liability exists only if the agency acts unreasonably, with reasonableness determined by balancing the public benefit and private damage in each case." *Id.* at 368.

The trial court in the instant matter charged the jury with the multiple *Locklin* reasonableness factors identified at 7 Cal.4th 368-369. The *Locklin* factors governing both inverse and non-inverse water torts were set forth in Jury Instruction No. 20. The *Locklin* reasonableness factors include the overall public purpose being served by the improvement, the degree to which plaintiffs benefitted by those improvements, the availability to the public entity of feasible alternatives with lower risks, and plaintiffs' obligation to take reasonable steps in defense and protection of their own property. In this context, the *Locklin* court wrote, " Reasonableness in this context also considers the historic responsibility of riparian owners to protect their property from damage caused by the stream flow and to anticipate upstream development that may increase that flow." 7 Cal.4th at 369. The *Locklin* court placed the burden of proof of demonstrating unreasonableness upon the plaintiffs. *Id.* *Locklin* held that the water tort

plaintiff must carry a burden of demonstrating that he undertook reasonable measures in defense of his own property and, failing such proof, cannot recover. *Id.* at 372-373.

The first two *Locklin* factors weigh only in the government' s favor. Petitioners and their neighbors absolutely needed to drive vehicles on Otero Court in order to access their residences. That was the overall public purpose being served by the first of the two public improvements —the street (Otero Court). The degree to which petitioners and all of their neighbors benefitted by the ability to drive vehicles on well-maintained, paved streets to go to and from their homes is inestimable.

The other public improvement was the drain connecting the street with petitioners' private pipe. The drain was a great benefit to petitioners. Without it, water coursing down Otero Court would have overtopped the curb, flowing directly onto and inundating the petitioners' front yards. The soil would soon have been compromised by saturation, failing decades sooner.

The drain solved all problems; it did not create any. If petitioners had but been vigilant landowners and hired a piping contractor to check the integrity of the developer' s drainpipe straddling their privately owned easement, all would have turned out differently. The piping contractor would have replaced or sleeved the old corrosion-prone metal pipe with a modern, space age, rustproof pipe. Petitioners did do

this after the hillside explosion, but they should have done it before.

Petitioners chose to purchase property located at the bottom of a road which sloped downhill. Any prospective purchaser would instantly observe that the street would channel adventitious water from private irrigation and rain downhill toward the land which they were contemplating acquiring. Likewise, any untrained person would easily see that there was an 18-inch-diameter pipe entrance in the curb face of the front of their property. Such a purchaser would reasonably check the deed or determine who owned the subterranean pipe straddling the boundary line. Ascertaining that the drainpipe belonged to them, they would (a) not buy the homes, or (b) hire a piping contractor.

After the hillside blowout, the petitioners engaged a piping contractor named Howard Janotta to sleeve their drainpipe with a smaller-diameter pipe constructed of non-corrosive space age material, polyvinylchloride. Had they simply thought to engage Mr. Janotta' s services before their hillside blew out, they could have averted or at least delayed the land damage for a good long while. It is not the government' s fault that successive homeowners simply neglected their responsibility to periodically ascertain the integrity of an outmoded piece of period technology.

The petitioners could have gone far toward establishing their *Locklin* burden by introducing the

testimony of a civil engineer that there were other (or at least another) methods of draining or diverting adventitious (non-governmental) water in a relatively inexpensive and technologically feasible way. The petitioners chose not to call upon such an expert. Instead, they conducted theretofore undeveloped ad hoc trial examination of that nature with respondent' s knowledgeable client representative, Transportation Director Butch Britt. Mr. Britt testified that there were no feasible alternatives, besides the Otero Street drain itself.

The street drain itself greatly assisted the petitioners by long delaying the land damage to their property. The County-owned drain inlet connected the street and the pipe. The drain inlet actually aided the petitioners' situation dramatically. Without it, adventitious water flowing down Otero Court would have overtopped the curb and inundated the front of petitioners' properties. Therefore, the County property helped, rather than disserved, the stability of the land by channeling the water safely for decades into the pipe. It is not the government' s fault that these private landowners did not see that water was flowing down their street into the drain inlet and take measures, such as retaining a piping contractor, to find out where that water was going and if it is was corroding or rusting a pipe. Having a massive investment like a multi-million-dollar home would be sufficient impetus for a reasonable person to ask where all that water flowing down the street was going and then, seeing it enter the 18-inch-diameter hole in their curb face, retain a piping contractor to

determine whether the pipe connected to that hole was in need of sleeving or replacement.

It makes all the sense in the world to place a reasonable burden like sleeving a pipe upon the people who benefit by the ownership of the home — petitioners. The two couples paid Mr. Janotta the comparatively small sum of $5,972.50 (split between the two husband-and-wife homeowners) to insert and anchor a polyvinylchloride flexible pipe into the interior of the existing rusted pipe. The new pipe was rust resistant and ran the entire length of the existing corrugated metal drain pipe. The PVC pipe was quite effective in safely channeling water from the street down into the gully behind the petitioners' properties. It was petitioner Barrett's idea to contact Mr. Janotta and instruct him to sleeve the existing corrugated metal pipe with a pipe comprised of modern material. No evidence was offered during trial of any inability to have completed this same process, pre-landslide.

Petitioner Patty Chan testified that she was well aware of the drain inlet in the curb face almost from the inception of their acquisition of the property. She periodically saw water entering the drain inlet. She thought she knew of the drain inlet as early as 2001. She characterized her failure to realize that the drain inlet must be connected to a subterranean pipe running the length of her boundary line as "stupid" and "dumb."

Rather than foisting upon the already massively overburdened taxpayers the cost of inspecting, servicing, and replacing drainpipes below ground on private property, whose dedication the government expressly rejected, it makes vastly more sense to ask private property owners to take reasonable precautions in defense of their own property. There is nothing hidden here. All of the petitioners could see that the street flowed downhill. All could see rain and private irrigation water running down the street into an 18-inch opening in the front of their properties through a symmetrical hole in the curb face. They could see that the water disappeared. They knew that they bought expensive homes precariously perched on the edge of a gorge. They knew that there was not too much land comprising their backyards and that they could ill afford to have it deteriorate. It would have made all the sense in the world to simply have retained a piping expert to do some preventive study and maintenance, rather than losing their homes and then blaming the government for it.

THERE ARE MULTIPLE MISSTATEMENTS OF THE RECORD IN THE CERTIORARI PETITION

On page 16 of the certiorari petition, it is stated that " County admittedly used said private land and pipe for County public street drainage . . . ." This is either a misstatement or a rhetorical ruse. The term " public" in the quoted phrase is definitely not synonymous with " government." If " public" means

that water from the sky, in the form of rain, and private irrigation water from the sprinklers and hoses of the neighbors on that street, Otero Court, flowed down the street toward petitioners' homes, then yes, it is admitted that "public" water flowed down the street. If "public" means rainwater and private irrigation water, then the statement is largely true, but if it means, or is intended to mean, water from some nonexistent government facility, then it is false.

At no time did the respondent ever admit "using" private land or the private pipe for any County drainage. This unsourced admission is typical of periodic, unsourced misstatements attributing an admission of fault to the respondent which simply never occurred. The respondent in this case never admitted using the private land for government street drainage. Petitioners never adduced any evidence whatsoever of a government plan or any government decision to utilize the street for any drainage purpose. It is true that the street does slope slightly downhill and does drain rainwater and private irrigation water toward petitioners' properties. But the one and only government action was accepting dedication of a developer's offer of a set of streets comprising a housing tract so that the members of the public who live there would have well-serviced roads to drive to and from their residences.

Page 17 of the petition states that the County has obstructed mitigation efforts. That is not true.

Petitioners threatened to block the drain inlet. The evidence at trial was that blocking the drain inlet would have caused massive pooling of water at the bottom of the street, making the cul-de-sac at the bottom of Otero Court a lake. This lake effect would cause cars, bicyclists, and pedestrians to slip, slide, and injure themselves and others, which would create a dangerous condition on County property, the road. It would also create more damage to the homes by causing the water to overtop the curb, thus inundating the front of the properties themselves. Therefore, the County Director of Public Works told the petitioners that if they blocked the drain, they would be creating a dangerous condition of public property on the street, via the lake effect, exposing the County and themselves to lawsuits by injured motorists, bicyclists, and pedestrians. The County Public Works Director informed the petitioners that he would probably take action, via the court system, to unblock the drain inlet, should petitioners choose to proceed with their threat.

Page 17 of the certiorari petition claims that the County knew that the public street drainage system would trigger the destabilization of the subject properties. This is an unsourced reference and completely untrue. There was no allegation or any evidence that the County knew, or even suspected, that the properties would be in danger of destabilization.

There was no evidence whatsoever, during trial or otherwise in this litigation, that the government

was using the street as part of any "drainage system." This is pure untrue rhetoric to say that there was some drainage system which had government knowledge or imprimatur. Petitioners cleverly use the rhetoric of a "public street drainage" to make it sound as though there were some government plan or decision to implement a drainage system when in fact there was none whatsoever. It is true that this was a public street and that there was drainage down the street, but utilization of the phrase "public street drainage," suggesting some government plan or conscious choice, is pure sophistry. There was no government plan or system whatsoever.

This straw man of a "public street drainage system" is repeated on page 17 of the petition and elsewhere in the petition. There is no evidence in this case of any government street drainage system. It is simply a public street which drains water down the natural slope of the street into the drainpipe underlying petitioners' properties —nothing more.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: January 13, 2011

Respectfully submitted,

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